

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ERIC D. MURPHY,)	
)	
Plaintiff)	
)	
v.)	Civil No. 98-0439-P
)	
MARTIN MAGNUSSON, et al.,)	
)	
Defendants)	

RECOMMENDED DECISION

Defendants Correctional Medical Services, Jackie Walker, and Ren Rouillard move to dismiss Plaintiff's claims for Plaintiff's failure to exhaust the administrative remedies available to him within the Maine Department of Corrections. Plaintiff concedes that he has not filed an internal grievance, indicating in his response that "if the Court so requires it, it will be easily done."

Plaintiff asserts that there is nothing requiring him to exhaust his administrative remedies prior to filing. However, the language of the statute quite clearly requires as much. 42 U.S.C. § 1997e(a) ("No action shall be brought . . . under section 1983 of this title . . . until such administrative remedies as are available are exhausted."); *eg., Wendell v. Asher*, 162 F.3d 887, 890 (5th Cir. 1998) ("[t]hat provision plainly

requires that administrative remedies be exhausted before the filing of a section 1983 suit, rather than while the action is pending”); *Jorss v. Vanknocker*, 1998 WL 549463 (N.D. Cal. Aug. 24, 1998) (not reaching the question whether the exhaustion requirement is jurisdictional in light of the mandatory nature of the statutory language).

Plaintiff’s failure to exhaust his administrative remedies is fatal as well to his claims against those Defendants not party to this Motion to Dismiss.¹ Further, in light of our conclusion on the exhaustion issue, it is not appropriate to address Defendants’ alternative argument that Plaintiff has failed to state a claim upon which relief may be granted. For Plaintiff’s failure to exhaust administrative remedies prior to bringing his claims before this Court, I hereby recommend Plaintiff’s Complaint Be DISMISSED in its entirety.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof.

¹ The remaining Defendants filed a Motion to Dismiss on May 21, 1999, which Motion does not raise Plaintiff’s failure to exhaust state remedies as a basis for dismissal. The existence of the Motion does not alter the Court’s conclusion on the exhaustion issue.

A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on May 24, 1999.